Marathaei d/o Sangulullai (suing on behalf of the estate of Thangayah Aupulley) & Anor v Syarikat JG Containers (M) Sdn Bhd & Anor

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-02-554 OF 1998

GOPAL SRI RAM, PS GILL AND RAHMAH HUSSAIN JJCA

28 FEBRUARY 2003

Administrative Law — *Rules of natural justice — Procedural fairness — Industrial Court denied representation to one party and allowed representation to the other — Whether principles of procedural fairness were breached*

Labor Law — *Industrial Court — Procedure — Representation — Whether workman precluded from having representation in non-compliance hearing under s 56 of the Industrial Relations Act 1967 — Industrial Relations Act 1967, s 27(1)(d)*

Words and Phrases — *'In any proceedings before the Court' — Industrial Relations Act 1967 s 27(1)(d)*

The appellant, now deceased, had been in the employment of the respondent. In July 1989, the Industrial Court had made an award in favor of the appellant. The respondent paid part of the award to the appellant but withheld the balance. The reason it gave was that the appellant had agreed to waive the balance. The appellant, being unhappy, moved the Industrial Court under s 56 of the Industrial Relations Act 1967 ('the Act') by way of a complaint of non-compliance. At the hearing, the respondent objected to the appellant being represented and the president ruled that the appellant was required to represent himself (the respondent had the advantage of representation). The appellant's legal representatives subsequently moved the High Court for certiorari to quash the award of the Industrial Court denying the appellant representation and for a consequential order of mandamus. The High Court dismissed the application and the present appeal was directed against that order. The central question in this appeal was whether s 27(1)(d) of the Act precludes a workman who had obtained an award in his favor from having representation in a non-compliance hearing under s 56 of the Act.

Held, allowing the appeal:

(1) The opening words of s 27(1), 'In any proceedings before the Court', are very clear and wide and must be taken to mean what they say. 'Any proceedings' must mean 'any proceedings under the Act' and must include non-compliance proceedings under s 56 of the Act. Nothing in para (d) of s 27(1) whittles down or cuts back on the width of the opening words of the section. Paragraph (d) merely identifies proceedings under s 20(3) of the

Act as one of those cases in which there may be representation with leave (see p 341F–H). A

(2) Sections 27 and 56 do not remove or curtail the common law right of a litigant to representation by counsel of his choice. The Act is silent on the issue. Parliamentary silence on a point of such importance enables the court to read such a right into the Act. The primary approach of a court to all written law is to act upon the presumption that Parliament does not intend an unfair or unjust result, that is to say, that it accords with the rule of law in art 8(1) of the Federal Constitution. Applying this presumption to the present case, there was no intention whatsoever on the part of Parliament to exclude the right of an individual workman to representation at the hearing of a non-compliance complaint (see pp 341I–342A, D, 344C–F). B C

(3) The Industrial Court as an adjudicatory tribunal must accord procedural fairness to those who appear before it. In the present case, it permitted the respondent to be represented but insisted on the workman being unrepresented. The decision of the Industrial Court denying the appellant the right to representation went against the fundamental principles of procedural fairness (see p 344F–G). D

[Bahasa Malaysia summary E

Perayu, kini simati, telah bekerja untuk responden. Pada Julai 1989, Mahkamah Perusahaan telah membuat suatu award memihak perayu. Responden telah membayar sebahagian daripada award itu tetapi tidak mejelaskan bakinya. Alasan yang diberikan adalah bahawa perayu telah bersetuju melepaskan baki tersebut. Perayu tidak berpuas hati dan telah memohon kepada Mahkamah Perusahaan di bawah s 56 Akta Perhubungan Perusahaan 1967 ('Akta tersebut') atas aduan ketidakpatuhan. Pada perbicaraan, responden telah membantah kerana perayu telah diwakili dan presiden telah memutuskan bahawa perayu dikehendaki mewakili dirinya sendiri (responden mempunyai perwakilan). Wakil undang-undang perayu telah memohon kepada Mahkamah Tinggi untuk certiorari untuk membatalkan award Mahkamah Perusahaan yang tidak membenarkan perayu mendapatkan perwakilan dan untuk perintah mandamus. Mahkamah Tinggi telah menolak permohonan tersebut dan rayuan ini adalah terhadap perintah tersebut. Soalan utama di dalam kes ini adalah sama ada s 27(1)(d) Akta tersebut mengecualikan seorang pekerja yang telah memperoleh suatu award yang memihak kepadanya daripada mendapatkan perwakilan di dalam suatu pembicaraan ketidakpatuhan di bawah s 56 Akta tersebut. F G H

Diputuskan, membenarkan rayuan: I

(1) Pembuka kata s 27(1), 'In any proceedings before the Court', adalah sangat jelas dan luas dan mesti dibaca sebagai

bermakna seperti apa yang ditulis. 'Any proceedings' mesti bermakna 'any proceedings under the Act' dan mesti termasuk prosiding-prosiding ketidakpatuhan di bawah s 56 Akta tersebut. Tiada apa-apa di dalam perenggan (d) s 27(1) yang mengurangkan keluasan pembuka kata seksyen tersebut. Perenggan (d) hanya mengenalpasti prosiding-prosiding di bawah s 20(3) Akta tersebut sebagai salah satu daripada kes-kes di mana mungkin terdapat perwakilan dengan kebenaran mahkamah (lihat ms 341F–H).

(2) Seksyen-seksyen 27 dan 56 tidak menyingkirkan atau mengurangkan hak common law seorang litigan untuk diwakil oleh seorang peguam pilihannya. Akta tersebut tidak menyebutkan isu tersebut. Sikap berdiam diri Parlimen di atas hak sepenting ini membolehkan mahkamah membaca hak sedemikian ke dalam Akta tersebut. Pendekatan utama mahkamah kepada segala undang-undang bertulis adalah untuk bertindak di atas anggapan bahawa Parlimen tidak berniat untuk memperolehi suatu keputusan yang tidak adil, iaitu, ianya mestilah mengikut kepatuhan perundangan seperti di dalam perkara 8(1) Perlembagaan Persekutuan. Memakai anggapan tersebut di dalam kes ini, tidak terdapat sebarang niat bagi Parlimen untuk menyekat hak seorang pekerja dari diwakili di dalam perbicaraan aduan ketidakpatuhan (lihat ms 341I–342A, D, 344C–F).

(3) Mahkamah Perusahaan sebagai suatu tribunal kehakiman mestilah memberi keadilan prosedur kepada orang yang menghadapnya. Di dalam kes ini, ia telah membenarkan responden diwakili tetapi telah menegaskan bahawa pekerja tersebut tidak boleh diwakili. Keputusan Mahkamah Perusahaan yang tidak membenarkan perayu diwakili melanggar prinsip-prinsip asasi keadilan prosedur (lihat ms 344F–G).

Notes

For cases on procedural fairness, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) para 606.

For cases on procedure in the Industrial Court, see 8 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 1302–1310.

Cases referred to

'Boucraa, The' [1994] 1 All ER 20 (refd)

Cooper v Wandsworth Board of Works (1863) 143 ER 414 (refd)

Doresamy v Public Services Commission [1971] 2 MLJ 127 (refd)

Malloch v Aberdeen Corporation [1971] 2 All ER 1278 (refd)

McCawley v R [1920] AC 691 (refd)

PP v Datuk Harun bin Haji Idris & Ors [1976] 2 MLJ 116 (refd)

Pesuruhjaya Ibu Kota Kuala Lumpur v Public Trustee & Ors [1971] 2 MLJ 30 (refd)

Pierson v Secretary of State for the Home Department [1997] 3 All ER 577 (refd) A

R v Secretary of State for the Home Department, ex parte Simms and another [1999] 3 All ER 400 (refd)

Rohana bte Ariffin & Anor v Universiti Sains Malaysia [1989] 1 MLJ 487 (refd) B

Legislation referred to

Federal Constitution art 8(1)
Industrial Relations Act 1967 ss 20, (3), 27, (1), (d), 56
Rules of the High Court 1980 O 53 C

Appeal from: Originating Motion No R1–25–111 of 1993 (High Court, Kuala Lumpur)

Sivarasa Rasiah (*M Mogannambal* and *Lateefa Koya* with him) (*Daim & Gamany*) for the appellants.

S Ravichandran (*Gomez & Associates*) for the respondents. D

Gopal Sri Ram JCA (delivering judgment of the court): This appeal raises a short but important point of public law. The facts relevant to the point lie in a narrow compass.

As long ago as 22 July 1989, the Industrial Court made an award in favor of one Thangiah Aupulley, now deceased, who had been in the employment of the respondent herein. We will refer to him as 'the workman'. The award was for a very small sum: RM15,592.10. The respondent paid RM10,000. It did not pay the balance. The reason it gave was that the workman had agreed to waive the balance. The workman was unhappy. So the workman moved the Industrial Court under s 56 of the Industrial Relations Act 1967 ('the Act') by way of a complaint of non-compliance. The workman was represented by an officer from the Malaysian Trade Union Congress ('MTUC'). The respondent was represented by an officer of the Malaysian Employers Federation ('MEF'). At the outset, the MEF officer objected to the workman being represented by the MTUC representative. The president of the court upheld the objection and held that the workman should represent himself. On a subsequent date of hearing, Mr Sivarasa Rasiah, an advocate and solicitor, and counsel for the appellants in this appeal, appeared for the workman before the same president. Again an objection was taken and upheld. As a result, the appellant was required to represent himself whilst the respondent had the advantage of representation. The workman then died and his legal representatives moved the High Court for certiorari to quash the award of the Industrial Court denying the workman representation and for a consequential order of mandamus. The High Court dismissed the application and the present appeal is directed against that order.

At the heart of this appeal lies the interpretation to be given to s 27(1)(d) of the Act. For completeness we reproduce the whole of s 27(1) below:

A (1) In any proceedings before the Court a party may —
(a) where the party is a trade union, be represented by an officer or employee of the trade union;
(b) where the party is an employer, appear himself personally or be represented by his duly authorized employee, or by an officer or employee of a trade union of employers of which he is a member;
B (c) where the party is a workman (in proceedings under subsection 20(3)), appear himself personally or where he is a member of the trade union of workmen, be represented by an officer or employee of the trade union;
(d) where the party is a trade union, or an employer, or a workman (in proceedings under subsection 20(3)), be represented with the
C permission of the President or the Chairman, by an advocate, or, notwithstanding anything to the contrary contained in any written law relating to the registration of trade unions, by any official of an organization (not being a trade union) of employers or of workmen, as the case may be, registered in Malaysia.

The Industrial Court held that the workman was not entitled to have legal
D or other representation at a non-compliance hearing and that finding was upheld by the High Court in proceedings for certiorari under the former O 53 of the Rules of the High Court 1980. The present appeal is directed against the refusal of prerogative relief by the High Court.

The central question in this appeal is whether s 27(1)(d) precludes a
E workman who has obtained an award in his favor pursuant to a reference under s 20 from having legal or MTUC representation in a non-compliance hearing under s 56 of the Act. If the answer to that question is in the affirmative, then both the Industrial Court and the High Court were correct in their respective decisions and this appeal must fail. On the other hand, if the answer is in the negative, then, of course, the Industrial Court
F was plainly wrong in the sense that its decision is flawed by an error of law.

In our judgment, it is the latter answer that is the correct response to the question posed. There are two reasons for this. First, the construction of s 27(1)(d) itself. The opening words of the section are very clear. And
G they are very wide indeed. They read: 'In any proceedings before the Court'. These words must be taken to mean what they say. 'Any proceedings' must mean 'any proceedings under the Act'. So, they must include non-compliance proceedings under s 56 of the Act.

The next stage of the inquiry is to determine if there is any thing in
H para (d) of s 27(1) that whittles down or cuts back on the width of the opening words of the section. We do not think that it does. In our judgment, para (d) merely identifies proceedings under s 20(3) of the Act as one of those cases in which there may be representation with leave. Section 20(3) relates, of course, to a complaint by an individual workman that he was dismissed without just cause or excuse.

I There is nothing in ss 27 or 56 that expressly or by necessary implication denies a workman the right to representation in non-compliance proceedings. It is merely silent. It does not remove or curtail the

common law right of a litigant to representation by counsel of his choice: provided, of course that such counsel is ready, willing and able to act. A

In *Doresamy v Public Services Commission* [1971] 2 MLJ 127, Raja Azlan Shah J (as he then was) recognized the existence of the common law right of representation. His Lordship said:

> Now this question must be posed: if he has a statutory right of appeal why cannot his solicitor appeal on his behalf? The regulation is silent on the right to the assistance of counsel. Is that adequate to deprive the aggrieved person of the right to the assistance of counsel? I think not. *The considerations requiring assistance of counsel in the ordinary courts are just as persuasive in proceedings before disciplinary tribunals. This is especially so when a person's reputation and livelihood are in jeopardy. If the ideal of equality before the law is to be meaningful, every aggrieved person must be accorded the fullest opportunity to defend himself at the appellate review stage.* Where he has a statutory right of appeal and the regulations are silent on the right to the assistance of counsel, he cannot be deprived of such right of assistance. I can find nothing from regulation 13(1) to limit his right. (Emphasis added.) B C D

Like the regulations in *Doresamy*, the Act is silent on the issue of representation by counsel for a workman in non-compliance proceedings. And, as in *Doresamy*, parliamentary silence on a point of such importance as representation by counsel enables the court to read such a right into the Act. It is just like the rules of natural justice being read into a statute in the absence of any express or implied provision going the other way. See *Malloch v Aberdeen Corporation* [1971] 2 All ER 1278. The principle of reading the requirement of procedural fairness into a statute may be traced to the following dictum of Byles J in *Cooper v Wandsworth Board of Works* (1863) 143 ER 414 at p 420: E

> [A]lthough there are no positive words in a statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature. F

It is now well settled that at common law, both procedural and substantive fairness may be read into a statute on the basis that Parliament is presumed to have legislated in accordance with the rule of law. This point was brought home in clear terms by Lord Steyn in *Pierson v Secretary of State for the Home Department* [1997] 3 All ER 577, at p 606: G

> But counsel addressed the wrong target. The correct analysis of this case is in terms of the rule of law. The rule of law in its wider sense has procedural and substantive effect. While Dicey's description of the rule of law (*Introduction to the Study of the Law of the Constitution* (10th Ed, 1968) p 203) is nowadays regarded as neither exhaustive nor entirely accurate even for his own time, there is much of enduring value in the work of this great lawyer. Dicey's famous third meaning of the rule of law is apposite. He said: H
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> > 'The "rule of law", lastly, may be used as a formula for expressing the fact that with us the law of constitution, the rules which in foreign countries naturally form part of a constitutional code, are not the source but the consequence of the rights of individuals, as defined and enforced by the courts; that, in short, the principles of private law have with us been by I

A the action of the courts and Parliament so extended as to determine the position of the Crown and its servants; thus the constitution is the result of the ordinary law of the land.'

This was the pivot of Dicey's discussion of rights to personal freedom, and to freedom of association and of public meeting (see pp 206–283). It is clear therefore that in the relevant sense Dicey regarded the rule of law as having B both procedural and substantive effect. In a valuable essay Professor Jeffrey Jowell has re-examined Dicey's theme: see *'The Rule of Law Today' in The Changing Constitution by Jowell and Oliver* (3rd Ed, 1994) pp 74–77. Relying on striking modern illustrations, Professor Jowell concluded that the rule of law has substantive content: see *Hall & Co Ltd v Shoreham-by-Sea UDC* [1964] 1 All ER 1, [1964] 1 WLR 1240, *Congreve v Home Office* [1976] 1 All C ER 697, [1976] QB 629 and *Wheeler v Leicester City Council* [1985] 2 All ER 1106, [1985] AC 1054 per Lord Templeman, with whom Lord Bridge of Harwich, Lord Brightman and Lord Griffiths agreed. *Wade Administrative Law* (7th Ed, 1994) pp 24ff and *de Smith and Brazier Constitutional and Administrative Law* (7th Ed, 1994) p 18, are to the same effect. *Unless there is the clearest provision to the contrary, Parliament must be presumed not to legislate* D *contrary to the rule of law. And the rule of law enforces minimum standards of fairness, both substantive and procedural. I therefore approach the problem in the present case on this basis.* (Emphasis added.)

Lord Steyn was, of course, speaking about the power of a parliament under what Lord Birkenhead in *McCawley v R* [1920] AC 691 termed an E 'uncontrolled constitution'. But we do not have an 'uncontrolled constitution'. We have what Lord Birkenhead termed in the same case, as 'a controlled constitution'. In other words, our Parliament, unlike the Parliament of the United Kingdom, has no power to enact a law that is ultra vires the Federal Constitution. This is the fundamental difference between our Federal Constitution and the British constitution. Failure to keep this F most elementary difference in the forefront of our minds will lead to serious and most basic constitutional errors.

The fundamental difference in the constitutional fabric of jurisdictions having a written constitution, such as Malaysia, and the United Kingdom comes across in the speech of Lord Hoffmann in *R v Secretary of State for* G *the Home Department, ex parte Simms and another* [1999] 3 All ER 400 at p 412:

Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 will not detract from this power. *The constraints upon its exercise by* H *Parliament are ultimately political, not legal.* But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most I general words were intended to be subject to the basic rights of the individual. *In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which*

exist in countries where the power of the legislature is expressly limited by a constitutional document. (Emphasis added.) A

Dicey's doctrine of the rule of law has influenced many Commonwealth constitutions. It has been expressly incorporated into almost all of them. Malaysia is no exception. The doctrine of the rule of law is housed in the equality provision in art 8(1) of our Constitution. Hence, translating Lord B Steyn's dictum in *Pierson v Secretary of State for the Home Department* into Malaysian terms, it is unconstitutional for our Parliament to enact a law or authorize the enactment of any subsidiary written law that conflicts with art 8(1).

Hence, the primary approach of a court to all written law is to act upon C the presumption that Parliament does not intend an unfair or unjust result, that is to say, that it accords with the rule of law in art 8(1). This is a presumption of ancient repute that finds its origins in the context of retrospective legislation. But it is of wider amplitude and of general application. Raja Azlan Shah J (as he then was) referred to it in *Pesuruhjaya Ibu Kota Kuala Lumpur v Public Trustee & Ors* [1971] 2 MLJ 30 at p 31. D Lord Mustill reaffirmed it in '*The Boucraa*' [1994] 1 All ER 20 at pp 29–30. It is a strong presumption. But it is rebuttable. And only when it is rebutted does the constitutionality of the particular written law become an issue. This is merely another way of saying, in the context of the constitutional validity of a statute, that there is a strong presumption in favor of E constitutionality (see *Public Prosecutor v Datuk Harun bin Haji Idris & Ors* [1976] 2 MLJ 116).

Applying the presumption of legislative fairness to the present case, we find no intention whatsoever on the part of Parliament to exclude the right of an individual workman to representation at the hearing of a non-compliance complaint. F

That brings us to the second reason for holding in the appellant's favor. It is axiomatic that the Industrial Court as an adjudicatory tribunal must accord procedural fairness to those who appear before it. In the present case, it permitted the respondent to be represented by someone from the MEF. Yet it insisted on the workman being unrepresented. One need G hardly do more than state what happened to realize the unfairness of the procedure adopted. The decision of the Industrial Court denying the appellant the right to representation goes against the fundamental principles of procedural fairness as enunciated by Edgar Joseph Jr J (as he then was) in his ground breaking judgment in *Rohana bte Ariffin & Anor v Universiti Sains Malaysia* [1989] 1 MLJ 487. H

Mr Ravichandran of counsel for the respondent, accepted the unfairness of the procedure accorded to the appellant in consequence of the ruling of the Industrial Court. He therefore did not seek to support the awards denying representation. His conduct of this appeal is entirely in keeping with the highest standards of the Bar. We commend him. I

Learned counsel for the appellant invited us to intervene and direct compliance. However, having given the matter a little more thought, he

A agreed with us that this is not an appropriate case for such intervention because there are issues of fact that require determination, particularly in respect of the defence taken by the respondent to the complaint of non-compliance. We therefore need say no more about this.

For the reasons given, the appeal was allowed. The order to the High
B Court was set aside. We also ordered that there be an order in terms of the appellant's motion before the High Court. The respondent was directed to pay to the appellant the costs at all levels. Because it was the respondent's stubborn stand before the Industrial Court that the appellant be denied representation at the non-compliance hearing that has occasioned so much delay in this matter and the need for the appellant to seek judicial review.
C We therefore directed that costs be taxed on a solicitor and client indemnity basis and be paid by the respondent to the appellant. The deposit in court was ordered to be paid out to the appellant. Lastly, the matter was remitted to the Industrial Court for hearing on merits.

High Court order set aside.

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Reported by Joel Ng

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